JUDGMENT OF THE COURT (Third Chamber)

9 February 2006 *

In Case C-305/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 July 2003,

Commission of the European Communities, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson and R. Caudwell, acting as Agents, and N. Paines QC, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr, U. Lõhmus (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by applying a reduced rate of value added tax ('VAT') to the commission received by auctioneers on the sale by auction of works of art, antiques and collectors' items ('works of art') imported under the arrangements for temporary importation, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(1), 5(4)(c), 12(3), and 16(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the

laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 1999/49/EC of 25 May 1999 (OJ 1999 L 139, p. 27) ('the Sixth Directive').

2 The present action more specifically concerns the VAT treatment applied to sales by auction of works of art placed under arrangements for temporary importation in the United Kingdom and imported into the territory of the Community after their sale.

Relevant provisions

Community legislation

The Sixth Directive

3 Article 2 of that directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

4 Under Article 5(4)(c) of that directive:

'the transfer of goods pursuant to a contract under which commission is payable on purchase or sale'

is also to be considered a supply within the meaning of paragraph (1).

5 Article 11B(1), (3) and (6) of the Sixth Directive provide:

'1. The taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force; this shall also apply for the import of goods referred to in Article 7(1)(b).

...

3. The taxable amount shall include, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the importing Member State and those due by reason of importation, excluding the value added tax to be levied;

(b) incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the importing Member State.

"First place of destination" shall mean the place mentioned on the consignment note or any other transport document by means of which the goods are imported into the importing Member State. In the absence of such an indication, the first place of destination shall be taken to be the place of the first transfer of cargo in the importing Member State.

The incidental expenses referred to above shall also be included in the taxable amount where they result from transport to another place of destination within the territory of the Community if that place is known when the chargeable event occurs.

...

6. By way of derogation from paragraphs 1 to 4, Member States which, on 1 January 1993, did not avail themselves of the option provided for in the third subparagraph of Article 12(3)(a) may provide that for imports of the works of art ... defined in Article 26a(A)(a), (b) and (c), the taxable amount shall be equal to a fraction of the amount determined in accordance with paragraphs 1 to 4.

That fraction shall be determined in such a way that the [VAT] thus due on the import is, in any event, equal to at least 5% of the amount determined in accordance with paragraphs 1 to 4.'

6 Article 12(3) of that directive reads as follows:

'(a) The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 2001 to 31 December 2005, this percentage may not be less than 15%.

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.

...

(c) Member States may provide that the reduced rate, or one of the reduced rates, which they apply in accordance with the third paragraph of (a) shall also apply to imports of works of art ... as referred to in Article 26a(A)(a), (b) and (c).

7 Article 14(1) of that directive lays down that the Member States are to exempt on importation, inter alia:

'(i) the supply of services, in connection with the importation of goods where the value of such services is included in the taxable amount in accordance with Article 11B(3)(b)'.

8 Article 16 of the Sixth Directive, as follows from Article 28c of that directive, provides for a number of exemptions linked to international goods traffic. Article 16(1) states:

'1. Without prejudice to other Community tax provisions, Member States may, subject to the consultations provided for in Article 29, take special measures designed to exempt all or some of the following transactions, provided that they are not aimed at final use and/or consumption and that the amount of [VAT] due on cessation of the arrangements on situations referred to at A to E corresponds to the amount of tax which would have been due had each of these transactions been taxed within the territory of the country.

...

E. supplies:

— of goods referred to in Article 7(1)(a) still subject to arrangements for temporary importation with total exemption from import duty or to external transit arrangements,

...

as well as supplies of services relating to such supplies.

By way of derogation from the first subparagraph of Article 21(1)(a), the person liable to pay the tax due in accordance with the first subparagraph shall be the person who causes the goods to cease to be covered by the arrangements or situations listed in this paragraph.

When the removal of goods from the arrangements or situations referred to in this paragraph gives rise to importation within the meaning of Article 7(3), the Member State of import shall take the measures necessary to avoid double taxation within the country.

...'

9 Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388 (OJ 1994 L 60, p. 16), which was to be implemented by the Member States by 1 January 1995, inserted Article 26a into the Sixth Directive. That provision, entitled 'Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques', reads as follows:

'*A. Definitions*

For the purposes of this Article, and without prejudice to other Community provisions:

...

(e) "*taxable dealer*" shall mean a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale;

(f) "*organiser of a sale by public auction*" shall mean any taxable person who, in the course of his economic activity, offers goods for sale by public auction with a view to handing them over to the highest bidder;

(g) "*principal of an organiser of a sale by public auction*" shall mean any person who transmits goods to an organiser of a sale by public auction under a contract under which commission is payable on a sale subject to the following provisions:

— the organiser of the sale by public auction offers the goods for sale in his own name but on behalf of his principal,

— the organiser of the sale by public auction hands over the goods, in his own name but on behalf of his principal, to the highest bidder at the public auction.

...

C. Special arrangements for sales by public auction

1. By way of derogation from B, Member States may determine, in accordance with the following provisions, the taxable amount of supplies of second-hand goods, works of art, collectors' items or antiques effected by an organiser of sales by public auction, acting in his own name, pursuant to a contract under which commission is payable on the sale of those goods by public auction, on behalf of:

...

2. The taxable amount of each supply of goods referred to in paragraph 1 shall be the total amount invoiced in accordance with paragraph 4 to the purchaser by the organiser of the sale by public auction, less:

— the net amount paid or to be paid by the organiser of the sale by public auction to his principal, determined in accordance with paragraph 3,

and

— the amount of the tax due by the organiser of the sale by public auction in respect of his supply.

3. The net amount paid or to be paid by the organiser of the sale by public auction to his principal shall be equal to the difference between:

— the price of the goods at public auction,

and

— the amount of the commission obtained or to be obtained by the organiser of the sale by public auction from his principal, under the contract whereby commission is payable on the sale.

...

7. The supply of goods to a taxable person who is an organiser of sales by public auction shall be regarded as being effected when the sale of those goods by public auction is itself effected.

...'

10 Article 28(1)(a) of the Sixth Directive, the wording of which follows from Directive 94/5, states that, until 30 June 1999, the United Kingdom may, for imports of works

of art, apply a reduced rate which may not be less than 2.5%. From that date, the United Kingdom was required to apply a standard rate or, under the derogation provided for in Article 11(B)(6), a reduced rate of not less than 5% to those imports.

The Customs Code

11 Article 29 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') provides:

'1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33 ...

...

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller ...'

12 Detailed rules for the implementation of the Customs Code are set out in Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1). The relevant provisions of that regulation are as follows:

'Article 576

...

3. Total relief from import duties shall be granted for the following:

(a) works of art ... as defined in "Annex I" of Directive [77/388], imported for the purposes of exhibition, with a view to possible sale;

(b) goods other than newly manufactured ones imported with a view to their sale by auction.

...'

'Article 582

1. Where goods placed under the arrangements in accordance with Article 576 are discharged by their entry for free circulation, the amount of the debt shall be determined on the basis of the elements of assessment appropriate to these goods at the moment of acceptance of the declaration for free circulation.

...'

National legislation

13 According to the case-file, the Value Added Tax (Special Provisions) Order 1995 (SI 1995/1268), which came into force on 1 June 1995 and transposed Directive 94/5 in the United Kingdom, provides in Article 12 for the application of the margin scheme to supplies by organisers of sales by public auction of works of art.

14 Article 3 of the Value Added Tax (Treatment of Transactions) Order 1995 (SI 1995/958) provides that the transfer of ownership in works of art imported with a view to sale, at a time when those works are still subject to arrangements for temporary importation with total exemption from import duty in accordance with the relevant provisions of the Customs Code, should be treated as neither a supply of goods nor a supply of services.

Facts and pre-litigation procedure

15 In the United Kingdom, works of art are imported with a view to possible sale by auction under the procedure for temporary importation with total exemption from import duty. If, after sale by auction, the work is definitively imported into the European Community, VAT is calculated on the basis of the price obtained on the sale by auction, including the auctioneer's profit margin. That amount is then reduced in accordance with Article 11B(6) of the Sixth Directive in such a way that the effective tax rate is equal to 5% of the applicable taxable amount.

16 The Commission, having established that, contrary to its obligations under Article 28(1a) and Article 28c(E)(1) of the Sixth Directive, the United Kingdom does not tax at the standard rate the profit margin of auctioneers on the sale by auction of imported works of art, sent that Member State a letter of formal notice on 17 March 1997 and initiated the procedure for infringement provided for in Article 226 EC.

17 In order to clarify its point of view, the Commission sent a supplementary letter of formal notice to the United Kingdom on 10 August 1998 in which it explained that that Member State had failed to comply with its obligations not only under Articles 28(1a) and 28c(E)(1) of the Sixth Directive, but also under Articles 2(1), 5(4)(c), 12 (3) and 26a of that directive.

18 Since the Commission was not satisfied by the replies of the United Kingdom authorities of 15 May 1997 and 12 October 1998, on 3 August 2000 it addressed a reasoned opinion to the United Kingdom requesting it to take the measures necessary to comply with that opinion within two months of its notification.

19 By letter of 16 November 2000, the United Kingdom authorities replied that they maintained the position they had previously set out. Taking the view that the United Kingdom had not taken all the measures necessary to comply with the reasoned opinion within the period prescribed, the Commission decided to bring the present action.

The action

Admissibility

20 The United Kingdom Government claimed in its rejoinder and during the oral procedure that the Commission had set out in its reply a new ground of complaint which had not been put forward in the pre-litigation procedure, which made its action inadmissible.

21 In the reasoned opinion and its application initiating proceedings, the Commission complained that the United Kingdom had not made the auctioneer's profit margin on the sale by auction of works of art imported under the arrangements for temporary importation subject to VAT on supplies within the territory of the country, within the meaning of Article 2 of the Sixth Directive. On the other hand, in its reply, it took the view that the United Kingdom had legitimately included that margin in the taxable amount on importation, but that it had miscalculated the VAT on importation.

22 The subject-matter of an action brought under Article 226 EC is delimited by the pre-litigation procedure provided for by that provision (see Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 11, and Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 35). The application must therefore be founded on the same grounds and pleas as the reasoned opinion (see, inter alia, Case

C-234/91 *Commission* v *Denmark* [1993] ECR I-6273, paragraph 16, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 28). If a charge was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see Case C-439/99 *Commission* v *Italy*, paragraph 11).

23 However, that requirement cannot be stretched so far as to mean that in every case the wording of the reasoned opinion and the subject-matter of the proceedings must be exactly the same, if the subject-matter of the proceedings has not been extended or altered but has simply been limited (see Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 19, and Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 29).

24 In this case, the Commission always maintained during the pre-litigation and litigation procedures that the United Kingdom applies a reduced rate of VAT to the auctioneer's profit margin, contrary to its obligations under the Sixth Directive. Whether or not that margin is an element of the customs value certainly does not change the fact that the United Kingdom applies an effective reduced rate. The Commission's view that such a margin must be taxed at the standard rate has not changed during the procedure.

25 The United Kingdom's plea seeking a declaration that the Commission has put forward a new complaint must therefore be rejected.

Substance

26 The main question in this dispute is whether the auctioneer's profit margin on the sale of works of art imported under the arrangements for temporary importation must be taxed as a transaction within the territory of the country in accordance with

the conditions referred to in Article 16(1) of the Sixth Directive. However, the Commission also pleads infringement of Articles 2(1), 5(4)(c) and 12(3). It must therefore be determined whether those provisions have been infringed as alleged.

27 The Commission observes that two chargeable events are involved in this case: an importation of goods and a transaction within the territory of the country. In all cases where importation is followed by a sale by a taxable person, both the importation and the sale must be taxed.

28 It complains that the United Kingdom did not separate the second taxable event, that is, the sale by auction, and did not tax it as a transaction within the territory of the country. That Member State has therefore failed to fulfil its obligations under Articles 2(1), 5(4)(c) and 12(3) of the Sixth Directive.

29 The United Kingdom Government acknowledges that there are potentially two chargeable events, namely the importation of the goods and their sale by auction. However, in its view, whilst the works of art concerned are placed under arrangements for temporary importation, the sales by auction in question are sales for export to the customs territory of the Community within the meaning of Article 29 of the Customs Code, and cannot at the same time constitute transactions within the United Kingdom.

30 Article 2 of the Sixth Directive distinguishes two categories of transactions subject to VAT: on the one hand, transactions effected within the territory of the country and on the other, the importation of goods.

31 It is apparent from Article 5(4)(c) of that directive that the auctioneer makes a supply of goods when he transfers goods pursuant to a contract concluded between himself and the seller or purchaser under which commission is payable.

32 Article 12(3) of the Sixth Directive fixes a standard rate of VAT applicable to all taxable transactions which do not give rise to a reduced rate.

33 As the Court has already held, it may be established from an analysis of the characteristics of the common system of VAT that, as regards transactions within the territory of a Member State, the chargeable event is constituted by the supply of goods for valuable consideration by a taxable person acting as such, whereas as regards imports the chargeable event is constituted by the mere entry of the goods into the territory of a Member State whether or not there is a transaction, and irrespective of whether the transaction is carried out for valuable consideration or free of charge, be it by a taxable person or a private person (see, inter alia, Case 15/81 *Schul* [1982] ECR 1409, paragraph 14).

34 In this case, the works of art imported with a view to sale by auction are placed under arrangements for temporary importation with total exemption from import duty upon entry into the Community, provided that their final destination is not known before the sale. When the goods are sold to a purchaser within the Community, importation is effected in the Member State in the territory of which the goods are removed from those arrangements.

35 The Sixth Directive provides for two different tax arrangements to be applied to importation and sale by auction of works of art. First, as regards importation, which is subject to VAT under Article 2(2) of the Sixth Directive, Articles 12(3)(c) and, by way of derogation, 11B(6) of that directive provide for a reduced rate of VAT to apply to the customs value of the imported goods. Secondly, as regards the sale by auction, the provisions of Article 26a(C) of the Sixth Directive have the effect, in

particular, of identifying in the overall value of the goods the auctioneer's commission when the auctioneer makes a supply within the meaning of Article 5(4)(c) of that directive. That commission thus constitutes the taxable amount for the sale by auction, taxed at the standard rate provided for in Article 12(3)(a) of that directive.

36 The Commission submits that Article 16(1) of the Sixth Directive imposes the overriding requirement that all operations carried out while the goods are under the arrangements for temporary importation must, if the goods are subsequently imported, be taxed as if the operations had been effected after the definitive importation of the goods. The effective reduced rate must therefore be applied to the value of the goods before their sale by auction, that is to say, to the price paid by the purchaser on that sale, less the auctioneer's commission. Then the standard rate of VAT is to be applied to that commission pursuant to Article 26a(C) of the Sixth Directive.

37 It states, moreover, that that rule applies regardless of the general rules on determination of the customs value set out in Articles 29 and 144 of the Customs Code and those in Article 11B(1) of the Sixth Directive.

38 The United Kingdom Government challenges those arguments. In its view, the tax regime which it applies is compatible with Article 16 of the Sixth Directive, since it is clearly apparent from that provision and from Article 11B of the same directive that the cost of such transactions is included in the taxable amount for imports and is not taxed as a transaction within the territory of the country, as would be the case for a transaction taking place after definitive importation. There would be double taxation if the auctioneers' commission were taxable again as consideration for a transaction within the territory.

39 It is common ground that Article 16(1) of the Sixth Directive, in the light of the arrangements referred to in E thereof, provides that the Member States may exempt from VAT certain transactions relating to goods subject to the arrangements for temporary importation, provided that they are not aimed at final use or consumption and that the amount of the VAT due on cessation of the arrangements corresponds to the amount of tax which would have been due had each of the transactions been taxed within the territory of the country.

40 Since that provision gives Member States the option to exempt certain transactions effected within the territory of the country for goods placed under arrangements or situations provided for by that provision, including the arrangements for temporary importation, it also requires them to fulfil certain conditions before they apply that exemption.

41 Although the time of definitive importation of goods, placed under arrangements for temporary importation upon entry into the Community, is deferred pursuant to Article 7(3) of the Sixth Directive to the time those arrangements cease to be applicable to the goods, it follows from the derogation provided for in Article 16(1) of that directive that all transactions effected under those temporary arrangements must be taxed as if they had been effected within the territory of the country after the definitive importation of the goods.

42 Accordingly, where a work of art is sold by auction under the arrangements for temporary importation and following that transaction imported into the territory of the Community, it is necessary to draw a distinction between the sale by auction and the importation and to tax the two transactions separately.

43 Consequently, in order to tax both the importation and the sale by auction in accordance with the conditions referred to in Article 16(1) of the Sixth Directive, it is necessary to draw a distinction between that part of the auction price which

corresponds to the auctioneer's commission and that which corresponds to the customs value of the imported goods. The former thus constitutes the taxable amount for the sale by auction, calculated under Article 26a of the Sixth Directive and levied at the standard rate laid down in Article 12(3)(a) of that directive, while the latter corresponds to the customs value of the goods which is subject to VAT on imports and levied at an effective reduced rate applicable in the United Kingdom under Article 11B(6) of that directive.

44 That interpretation is in accordance with the objective of Article 16(1) of the Sixth Directive, which is to ensure, in particular, fiscal neutrality between transactions relating to goods placed under the arrangements for temporary importation and subsequently imported, on the one hand, and those concerning goods which are already within the territory of the Community, on the other.

45 Having regard to the analysis set out in paragraph 43 of this judgment and, in particular, the fact that the value of the auctioneer's commission must be distinguished from the customs value of the goods concerned for the purposes of their respective taxation, the United Kingdom's argument that the auctioneer's profit margin is part of the import value, in accordance with Article 11B(1) and (3)(b) of the Sixth Directive, in conjunction with Article 29 of the Customs Code, is not well founded.

46 The United Kingdom's argument that the first subparagraph of Article 16(1) of the Sixth Directive is a provision which is optional for the Member States, whereas the last subparagraph of that provision, which lays down the obligation to avoid double taxation, is mandatory, must also be rejected. In its view, the latter obligation requires the Member States not to treat the transaction carried out by the auctioneer as a transaction within the territory of the country.

47 As the Commission rightly submits, when the Member State makes use of the option available under Article 16(1) of the Sixth Directive by taking special measures to exempt transactions relating to goods under the arrangements for temporary importation, it must comply with all the conditions laid down by that provision.

48 Regarding the obligation to avoid double taxation, provided for by the last subparagraph of Article 16(1) of the Sixth Directive, it must be observed that that provision concerns the person liable to pay the tax due. According to the preceding subparagraph of that provision, by way of derogation from the first subparagraph of Article 21(1)(a) of that directive, the person liable to pay the tax due on the transactions referred to in the first subparagraph of Article 16(1) of that directive is the person who causes the goods to cease to be covered by the arrangements or situations listed in that provision. In order to avoid any confusion as to the person liable to pay the tax, the Sixth Directive provides for the obligation to avoid double taxation, without that affecting in any way the rate applicable to the auctioneer's profit margin.

49 In those circumstances, having regard to the fact that the sale by auction of works of art under the arrangements for temporary importation, followed by importation into the territory of the Member State concerned, must be regarded as a transaction effected within the territory of the country and must be taxed as such, it must be held that the Commission's complaint relating to an infringement of Article 16(1) of the Sixth Directive is well founded.

50 Since the sale by auction must therefore be classified as a transaction which took place within the territory of the country, it must also be held that Articles 2(1), 5(4)(c) and 12(3) of the Sixth Directive have been infringed.

51 In the light of the foregoing, it must be held that, by applying a reduced rate of VAT to the commission received by auctioneers on sales by auction of works of art

imported under the arrangements for temporary importation, the United Kingdom has failed to fulfil its obligations under Articles 2(1), 5(4)(c), 12(3) and 16(1) of the Sixth Directive.

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has failed in its submissions, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by applying a reduced rate of value added tax to the commission received by auctioneers on sales by auction of works of art, antiques and collectors' items imported under the arrangements for temporary importation, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2(1), 5(4)(c), 12(3) and 16(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 1999/49/EC of 25 May 1999;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]